1989

Utah State Credit Union v. William L. Gregg and Karen R. Gregg : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

UTAH STATE CREDIT UNION,	:	APPELLANT'S BRIEF
Plaintiff and Appellant,	:	
vs.	:	Priority #14(b)
WILLIAM L. GREGG and KAREN R. GREGG,	:	
Defendant and Respondent.	:	Appellate No. 890027-CA

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LIST OF PARTIES

The caption of the case contains the names of all parties.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to §78-2a-3 (2) (c), Utah Code Annotated.

NATURE OF THE PROCEEDINGS

This case is an appeal from a final Judgment and Order of the Third Circuit Court, Murray Department, entered by the Honorable L. H. Griffiths, dated December 15, 1988.

The Court granted Judgment against the Plaintiff pursuant to the Defendant's Counterclaim in the sum of $3,264.00.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the trial Court err in apparently determining that the payments made were from the separate funds of William Gregg and did not come from Karen who was fully obligated to pay on the note to Utah State Credit Union.

II. Did the trial Court err by failing to categorize the payments to Utah State Credit Union as voluntary payments under 11 USC §524 (f).

III. Assuming, arguendo, that the trial Court correctly determined the payments made to Utah State Credit Union were from the separate funds of William Gregg and that these payments were not voluntary payments within the meaning of §524 (f), did the trial Court use the wrong measure for computing damages.

IV. Did the trial Court err by failing to make written Findings of Fact and Conclusions of Law to support its decision.

DETERMINATIVE CONSTITUTIONAL

PROVISIONS, STATUTES AND RULES

11 USC §524 (a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates an an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 USC §524 (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(3) such agreement has been filed with the court and if applicable, accompanied by a declaration of an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that such agreement--

(A) represents a fully informed and voluntary agreement by the debtor; and

(B) does not impose an undue hardship on the debtor or a dependent of the debtor.

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, which occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an under hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

11 USC §524 (d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall--

(1) inform the debtor--

(A) that such an agreement is not required under this title; under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of--

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement.

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c) (6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

11 USC §524 (f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

§78-2a-3 (2) (c), Utah Code Annotated, as amended, 1953. Court of Appeals jurisdiction [Effective January 1, 1988].

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(c) appeals from the circuit courts.

STATEMENT OF THE CASE

Prior to August, 1985, Respondents (Greggs) secured several loans from Appellant (Utah State Credit Union, hereinafter "USCU"). One of the loans was secured by a Fiat automobile and Honda Motorcycle. (Transcript p. 2)

On August 9, 1985, the Greggs filed a petition in bankruptcy. Mrs. Gregg failed to attend the First Meeting of Creditors and, consequently, her petition was dismissed. Mr. Gregg was granted a discharge on November 22, 1985. (Transcript p. 30)

During the intervening period between the filing of the

petitions for bankruptcy and Mr. Gregg's discharge, they both signed a new Note with USCU for $6,686.96. This Note was a rewrite of the loans the Greggs had outstanding prior to the filing of the bankruptcy petitions. The Note was signed by both Mr. and Mrs. Gregg. However, no Reaffirmation Agreement was ever executed or approved by the Bankruptcy Court. The Greggs' purpose in signing the Note was to retain the collateral, the car and motorcycle, which they had previously pledged. The Greggs made payments on the Note until approximately March 1987, after which they refused to make any additional payments. The collateral was subsequently repossessed and sold. (Transcript p. 31)

After the sale of the vehicles, USCU instituted suit against the Greggs to recover the balance due after the sale of the collateral. (Transcript p. 2)

Upon discovery by USCU that Mr. Gregg had been discharged in bankruptcy from this particular debt he was dropped as a party to the action. A few days prior to the trial itself, Mrs. Gregg again filed bankruptcy and as of this moment any actions relating to Mrs. Gregg are stayed pending the outcome of that bankruptcy. (Transcript p. 3)

SUMMARY OF ARGUMENT

Karen and William Gregg borrowed money from USCU. Finding they were unable to meet their commitments, Mr. Gregg filed bankruptcy. Desiring to retain their collateral, the Greggs signed a new note with USCU. Now, having wasted the

collateral and having had the benefit of its use for over a year and a half, the Greggs want their money back.

Payments made by Karen Gregg, or with her funds, are clearly not refundable because the new note was a valid debt as to her. For that reason, the Greggs have attemped to create the fiction that although both Karen and William bring home approximately the same amount of income and pool their money in a joint bank account, the payments to USCU were from William Gregg's separate funds.

Such a determination is contrary to both the facts and the law. The facts show that such a separation is irrational and inequitable. The law shows that once the funds are placed in a joint bank account they are the joint funds of the account owners, William and Karen Gregg.

Even were such a separation possible, William Gregg would not be entitled to a refund, because the payments made would be voluntary payments to USCU to forestall repossession of the collateral or suit against his wife. Mr. Gregg had no obligation under the new note as he was discharged in bankruptcy and no reaffirmation agreement was executed. Mrs. Gregg could at any time, as she did prior to the trial, file again for bankruptcy and likewise step out from liability. Where payments are made to security lien holders to retain collateral they are considered voluntary repayments.

Finally, even if the lower court had been correct in determining the Greggs deserve a refund of money from USCU, the amount, as a matter of law and equity, should be reduced by the

amount of benefit received by the Greggs to prevent a windfall. In this instance, that amount should take into account the depreciation of the collateral while it was driven for a year and a half by the Greggs.

ARGUMENT

POINT I. RESPONDENTS ARE NOT ENTITLED TO A REFUND OF ANY MONEY PAID BY APPELLANT.

A. Karen Gregg Was Fully Obligated To Make Payments On The Loan.

In William Gregg's schedule of income and expenditures filed with his bankruptcy petition (Exhibit "A"), he claimed average monthly income consisting of take-home pay for himself of $1,000.00 and for his wife, $700.00. The money earned from these activities was pooled in a joint bank account. Upon such pooling, both Greggs became joint owners of the funds so deposited. Beehive State Bank v. Rosquist, 21 Utah 2d17, 439 P.2d 468. (1968). Any money paid into such a joint account is therefore the joint property of both. Therefore, Mr. Gregg's claim that he paid the money from separate funds is totally inaccurate. It would be inequitable and totally impractical to require a lender to try and identify the actual source of joint funds once it has been commingled in the joint account. Peterson v. Peterson, 571 P2d 1360, 1363 (Utah 1977).

Because Karen Gregg's first bankruptcy petition was dismissed, she was fully obligated to make payments on the note

up until the time she filed her second petition a day or two before the trial. The Greggs conceived the fiction that her obligation could be avoided if they simply claimed that the money came from William's separate funds. This proposition simply cannot be supported. The money came from joint funds and both parties received the benefits of the continued use of the collateral. While they were using the collateral they had the responsibility to keep up the payments. To now rule that they are entitled to a refund would be totally inequitable and result in substantial injustice to USCU.

B. All Payments Were Voluntary Payments Permitted By 11 USC §524 (f).

USCU concedes that the Note signed by William Gregg was not a valid Reaffirmation Agreement as set forth in 11 USCA, Section 524. However, 11 USC, Section 524 (f) provides that nothing in the provisions relating to reaffirmations [Section 524 (c) and (d)] prevents a debtor from voluntarily repaying any debt. While Section 524 (c) and Section 524 (d) preclude USCU from taking any affirmative action against William to enforce the new note, they do not preclude it from accepting voluntary payments from William or from proceeding normally to collect the account from Karen.

Even if it could be shown that the money paid to USCU was from the separate funds of William Gregg, his choice to pay that money in order to continue to use the collateral and to preclude suit against his wife is a voluntary payment as set

forth in Section 524 (f). He would, therefore, not be entitled to demand his money back, especially after having enjoyed the benefit and use of the collateral for over a year and a half.

In In Re Klapp, 80 B.R. 540 (Bkrtcy W.D. Okl. 1987), debtors held a mortgage which secured a debt previously discharged in a Chapter 7 proceeding. In regard to that debt, the Court found:

> . . . no reaffirmation agreement of the debt under 11 USC, Section 524 (c) was filed or otherwise entered into and a discharge was subsequently granted the debtors.
>
> Debtors nevertheless continued to make, and objecting creditors continued to accept, monthly debt service payments in accordance with the provisions of the Promissory Note. (In Re Klapp, page 541)

The Court was then faced with determining what these payments constituted. The Court found:

> . . . the Court has previously noted that objecting creditors accepted payments in excess of $8,000.00 between the date debtors filed a Chapter 7 petition and February, 1987, allocating such payments to principal and interest as though the debt was reaffirmed, even though no such reaffirmation was ever filed. Under 11 USC Section 524 (a) the discharge in debtor's Chapter 7 case operated as an injunction against the commencement or continuation of any action, the employment of process or any act to collect, recover or offset any debt discharged as a personal liability the debtor. With this in mind, objecting creditors must be assumed to have treated the post-discharge payments as voluntary payments by debtor, which is permitted by Section 524 (f).
> In Re Klapp at 544.

In In Re Klapp, there was no obligation on the part of the creditors to return the money voluntarily paid by the debtors.

To like affect was the finding of the Court in In Re Whitaker, 85B.R.788 (Bkrtcy. E.D. Tenn. 1988). In Whitaker the

debtors owned an automobile upon which the bank had a perfected security interest. Debtors continued to make payments on the automobile following their filing for bankruptcy. The debtors neither sought to redeem the automobile from the lien of the bank nor to negotiate a reaffirmation of terms with the bank. Debtors hoped that by continuing to make voluntary post-petition payments under the terms of the pre-petition secured obligation they would be entitled to retain possession of the car in accordance with the agreement.

The Court found that the payments by the debtors were voluntary post-petition payments under Section 524 (f). It also found that debtors were not entitled to retain possession of the automobile after filing bankruptcy. The Court apparently allowed the creditors to retain the payments made by the debtor in spite of the fact that no valid reaffirmation agreement was executed between the parties.

These cases are similar to the instant case in that they both reflect post-petition payments of debts secured with a valid security interest where no valid reaffirmation agreement was signed by the parties and submitted to the Court. In fact, the only difference between the instant case and Whitaker is that in the instant case debtors were allowed to retain the use of the collateral whereas in Whitaker the Bankruptcy Court approved the repossession of the property against the wishes of the debtors.

Furthermore, there was no evidence of undue influence or coercion on the part of USCU to force the Greggs to make the

payments after William's bankruptcy. The only undue influence even claimed by the Greggs is that "the creditor here was in a much-substantially stronger bargaining position in terms of applying some leverage and pressure." (Transcript, p. 36). Certainly there was some "leverage" held by USCU, i.e., make payments or turn over the collateral. This, however, is certainly not undue influence or coercion as USCU is simply asserting the rights given to it as a secured creditor under the Bankruptcy Code.

Therefore, the payments made were "voluntary payments" and USCU has every right to keep them under 11 USC §524 (f).

POINT II. THE TRIAL COURT USED THE WRONG STANDARD FOR DETERMINING DAMAGES.

Assuming, arguendo, that this Court were to determine that the payments made on the new Note to USCU were made from the separate funds of Mr. Gregg and further that those payments were made in violation of 11 USC, Section 524 (c), the standard for determining the damages used by the trial Court was inappropriate.

The trial Court awarded Mr. Gregg the full amount of all payments made on the new Note. However, the correct standard in cases where the debtor has retained possession of collateral and continued to make payments based on an invalid reaffirmation agreement is set forth in In Re Kendrick, 75 B.R. 451 (Bkrtcy. N.D. Ga. 1987).

In Kendrick the Court found that the creditor, the bank,

had used undue influence and coercion to require the debtor to execute a new Note which was a consolidation of all his pre-petition debts to the bank. As collateral for this new Note, the debtor pledged his car upon which the bank already had a valid security interest. In ordering the bank to return to the debtor all payments it had received in excess of the value of the automobile on the date the bankruptcy petition had been filed the Court reasoned:

> . . . the bank was entitled to surrender of the vehicle or payment of its value. Debtor has retained possession and the benefits of the vehicle and never returned or tendered return of the vehicle. It would be inequitable to permit debtor to retain the benefits of the continued possession and use of the vehicle. (Kendrick, page 456)

When he filed his bankruptcy, Mr. Gregg completed schedule A-2 (Exhibit B), designating those creditors holding security interests in certain properties. On this schedule, Mr. Gregg listed USCU as having a security interest in the Fiat automobile and the Honda motorcyle. The market value of these items on that date as shown on Gregg's schedules totaled $3,200.00. Upon sale of the secured property USCU received $1,125.00. As per the holding in Kendrick, USCU would then be entitled to receive additional amounts up to the sum of $2,075.00, which is in effect the depreciation in the value of the collateral from the date of bankruptcy filing up to the time of repossession. Therefore, the total judgment should not have exceeded $1,164.00 plus defendant's costs in the sum of $25.00, for a total judgment of $1,189.00.

POINT III. THE TRIAL COURT FAILED TO MAKE FINDINGS AND CONCLUSIONS UPON WHICH TO BASE ITS DECISION.

Rule 52, Utah Rules of Civil Procedure, requires that "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon."

No findings of fact or conclusions of law were made by the Court in this matter. "Failure to find upon all material issues raised by the pleadings is reversible error." LeGrand Johnson Corp. v Peterson, 18 Utah 2d 260, 120 P.2d 615 (1966).

Since no waiver of the findings and conclusions was made by the parties in this action, the decision must be reversed and remanded for further proceedings. Boyer Co v. Lignell, 567 P.2d 1112 (Utah 1977).

CONCLUSION

It is respectfully submitted that the trial Court erred in awarding Judgment against the Plaintiff for the following reasons:

(1) Karen Gregg was fully obligated to continue to make payments on the note and the proposition that the payments were made solely from William Gregg's separate funds cannot be supported by the law or facts of this case.

(2) USCU had every right to continue to accept voluntary payments after William's discharge pursuant to 11 USC §524 (f).

(3) Even assuming, arguendo, that the Appellant was not entitled to accept the payments, USCU was entitled to be compensated for the depreciation of the vehicles from the date of the bankruptcy petition until the time they were repossessed.

(4) The Court failed to make Findings of Fact and Conclusions of Law as required by law.

Appellant, therefore, respectfully requests that the Judgment of the Circuit Court be reversed and that this Court award Appellant costs and such other relief as is appropriate.

Respectfully Submitted this 10th day of July, 1989.

DALE R. KENT

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 10th day of July, 1989, four true and correct copies of the foregoing document were mailed to the following:

J. Wayne Gillman
431 South 300 East #101
Salt Lake City, UT 84111

DRK06

SCHEDULE OF CURRENT INCOME AND CURRENT EXPENDITURES

EXHIBIT A

Name of Debtor: William Gregg and Karen Gregg

EXPENSES

ESTIMATED AVERAGE FUTURE MONTHLY EXPENSES OF DEBTOR (NOT INCLUDING DEBTS TO BE PAID UNDER A PLAN UNDER CHAPTER 11 OR CHAPTER 13 OF THE BANKRUPTCY CODE) CONSISTING OF

RENT OR HOME LOAN PAYMENT (INCLUDE LOT RENTED FOR MOBILE HOME)		$ 310.00
UTILITIES	ELECTRICITY $ 55.00	
	WATER $ .00	
	HEAT $ 75.00	
	TELEPHONE $ 32.00	
	OTHER $	
	TOTAL UTILITIES	$ 162.00
FOOD		$ 350.00
CLOTHING		$ 50.00
LAUNDRY & CLEANING		$ 25.00
NEWSPAPERS PERIODICALS & BOOKS (INCLUDING SCHOOL BOOKS)		$ 15.00
DOCTOR & MEDICAL EXPENSES		$ 30.00
TRANSPORTATION (NOT INCLUDING AUTO PAYMENTS TO BE PAID UNDER A PLAN UNDER CHAPTER 11 OR CHAPTER 13 OF THE BANKRUPTCY CODE)		$ 150.00
RECREATION CLUB & ENTERTAINMENT		$ 75.00
INSURANCE (NOT DEDUCTED FROM WAGES		
	AUTO $ 17.50	
	LIFE $ .00	
	OTHER $ Motorcycle 9.00	
	TOTAL INSURANCE	$ 26.50
TAXES NOT DEDUCTED FROM WAGES OR INCLUDED IN HOME LOAN PAYMENTS		$ .00
IF YOU PAY OR ARE LIABLE FOR PAYMENT OF ALIMONY OR SUPPORT PAYMENTS STATE MONTHLY AMOUNT		$ .00
THE NAME AGE & RELATIONSHIP TO YOU OF PERSONS FOR WHOSE BENEFIT PAYMENTS ARE MADE		
PAYMENTS FOR SUPPORT OF ADDITIONAL DEPENDENTS NOT LIVING AT YOUR HOME		$ .00
OTHER (EXPLAIN)		$ .00
TOTAL ESTIMATED FUTURE MONTHLY EXPENSES		$ 1,193.50

INCOME

GIVE ESTIMATED AVERAGE FUTURE MONTHLY INCOME CONSISTI

DEBTOR S TAKE HOME PAY (PER MONTH)	$ 1,000.
SPOUSE S TAKE HOME PAY (PER MONTH)	$ 700.
REGULAR INCOME AVAILABLE FROM OPERATION OF BUSINESS OR PROFESSION	$
DO YOU RECEIVE ANY ALIMONY OR SUPPORT PAYMENTS? IF SO STATE MONTHLY AMOUNT	no $
THE NAME AGE & RELATIONSHIP TO YOU OF PERSONS FOR WHOSE BENEFIT PAYMENTS ARE RECEIVED	
PENSION SOCIAL SECURITY OR RETIREMENT INCOME	$ n/a
OTHER MONTHLY INCOME	$ .0
TOTAL MONTHLY INCOME	$ 1,700.0
TOTAL MONTHLY EXPENSES	$ 1,193.50
AMT OF PAYMENT TO THE TRUSTEE (If Applicable under Chapter 13 Plan)	$ n/a
TOTAL OF EXPENSES AND PLAN PAYMENT (If Applicable)	$ n/a
DIFFERENCE (If Applicable Under Chapter 13 Plan)	n/a $

DEPENDENTS

NUMBER AGE & RELATIONSHIP OF DEPENDENTS (EXCEPT CURRENT SI

Asnley Marie Gregg age 7, daugnter
Misty Lee Gregg, age 4, daugnter.

COMPENSATION PAID OR PROMISED TO ATTORNEY FOR DEBTOR

HAVE YOU PAID OR AGREED TO PAY (OR TRANSFERED OR AGREED TO TRANSFER ANY PROPERTY) TO YOUR ATTORNEY FOR SERVICES IN CONNECTION WITH CASE OTHER THAN AGREEING TO PAY SUCH COMPENSATION AS MAY BE ALLOWED BY THE COURT TO BE PAID BY THE TRUSTEE FROM MONIES PAID TO THE T FOR YOUR ACCOUNT? YES ☐ NO ☒

IF THE ANSWER IS YES STATE THE NATURE AND THE AMOUNT OF COMPENSATION PAID OR PROMISED AND THE SOURCE OF THE PAYMENT

Schedule A-2 — Creditors holding security

Name of creditor and residence or place of business (if unknown so state), include zip code	Description of security and date when obtained by creditor	Specify when claim was incurred and the consideration therefor, when claim is contingent, unliquidated disputed subject to setoff evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate specify name of any partner or joint contractor on any debt	Market value	Amount of claim without deduction of value of security
Utah State Employee's Credit Union 660 South 2nd East Salt Lake City, Utah 84145-0001	Automobile, 1978 Fiat Rally	Incurred April 1983, purchase of automobile	$1,000.00	$873.00
Utah State Employee's Credit Union 660 South 2nd East Salt Lake City, Utah 84145-0001	1984 Honda Magna Motorcycle	Incurred July 1984, purchase	2,200.00	2,734.16
		Total	$ 3,200.00	$ 3,607.16

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EXHIBIT B

P R O C E E D I N G S

THE COURT: With regards now to the Credit Union vs. Gregg matter. Do you wish to make an opening statement?

MR. KENT: We could probably help the Court out a little bit on this. The--let me explain where we're at on this.

Mr. Gregg had filed bankruptcy, a Chapter 7 bankruptcy in 1985. After that time--I guess at the same time, his wife also filed bankruptcy. The wife apparently didn't show up at the first meeting of creditors, her bankruptcy was dismissed, and the--and a bankruptcy discharge was entered on behalf of Mr. Gregg in this case. That was in November of 1985, I believe, that discharge was granted.

Just a week or so before that, the time the discharge was granted, they had these folks in, the credit union did, and they re-signed some papers. What it was was a consolidation of three previous loans that Mr. Gregg had had. There was a signature loan, actually two signature loans, a loan for a motorcycle, and a loan for a car. Both Mrs. Gregg and Mr. Gregg signed those documents.

There was not any reaffirmation agreement approved by the United States Bankruptcy Court, and this was being a reaffirmation of a debt owed by Mr. Gregg. I filed suit after being advised by my client that the loan had gone

delinquent. I was immediately notified by a pro se answer from the defendant that he filed bankruptcy and the debt had been discharged and that he had never signed any reaffirmation. Shortly after that, I was also contacted by Mr. Gillman on behalf of the defendants.

I subsequently filed my own motion to dismiss the matter as against Mr. Gregg, being fully aware of the fact that without our signed reaffirmation, court-approved reaffirmation, we had no right to proceed against him to collect on a debt that was discharged in the bankruptcy.

That still left Mrs. Gregg as a defendant in the action. Mr. Gregg, Mr. Gillman on his behalf, filed a counterclaim against the credit union, claiming that the monies which had been paid pursuant to the reaffirmation on his part and simply a renegotiation of a loan with Mrs. Gregg, he claimed that he was entitled to have that money back, indicating and claiming in his counterclaim that those monies were paid because he was under the assumption that he had a legal and binding reaffirmation agreement, so he paid those monies.

He's now asked for some $4,700 back, claims that he ought to have that back. Said that all the payments that were made were made by him personally and that his wife didn't make any of those payments, so he wants his money back. Mrs. Gregg filed bankruptcy last week, so we're not

on August 9 of 1985, the Greggs filed a petition in bankruptcy. At the 341 meeting of creditors, Mrs. Gregg, for reasons that are probably not relevant to this proceeding, failed to appear and the matter was bifurcated, bifurcated by the bankruptcy court and the matter dismissed as to her.

I think there's no dispute that following that time, I think that the note that is now in evidence will reflect that the defendants signed the note at different times, I think one was October 10 and one signed on October 19, but in anyevent, the new note was signed.

MR. KENT: Excuse me. Can I interrupt for just one second? Just to make something clear, I'm sorry to interrupt. We're not dismissing the case against Mrs. Gregg at this time, it's just stayed. We don't know what's going to happen with her bankruptcy. We have dismissed against Mr. Gregg.

MR. GILLMAN: And that's correct.

THE COURT: I look at that--is it the 17th or the 19th? It's a little hard to see there on that, the date that Mrs. Gregg signed that note.

MR. GILLMAN: I thought it was the 19th. The Court may be correct, I'm not sure--

THE COURT: It's looks like it was 11 and then she made a seven out of it, but she may have tried to be a 19, I just was wondering.

MR. GILLMAN: I'm not sure that it makes a great deal of--

THE COURT: It doesn't make a lot of difference. Go ahead.

MR. GILLMAN: --of difference, really. Certainly, the signatures occurred prior to the date of the entry of the discharge, which I believe was November 22nd of 1985.

The new note, as I think has been stipulated, was a consolidation of all the pre-petition dischargeable debts and was signed in order to allow Mr. Gregg to keep possession of the motor vehicles which he was trying to use in connection with his job. The new note was the total sum of $6,686.96, as appears on the exhibit.

From about 30 days after that, the Fiat was inoperable. The time of year it was, I suppose the motorcycle was not usable, it was very cold, and it was put into storage.

Mrs. Gregg herself made no payments on that obligation. She maintains self-employment in the home as a child care provider. She isn't even a licensed driver. She had no need for the vehicles.

The Greggs were called into the credit union, this note was presented to them, they were never properly advised of their rights. The simple fact of the matter is, as a reaffirmation agreement, it is invalid, and the

bearing, maybe they weren't in this case, but certainly as in most cases, the creditor here was in a much--substantially stronger bargaining position in terms of applying some leverage and pressure, you've got a debtor out there, a couple of vehicles, he'd like to have them, you've got to reaffirm there's--in order to keep these vehicles. There was no relation, as far as we can see, to the amount of the new note the actual value of the vehicles. The new note was for in excess of $6,000.

Once the vehicles were repossessed a fairly short time later, one was worth nothing and the other one was worth $1,150. I think there's clear over-reaching on the part of the credit union in this situation and to allow them to keep this sum of money simply because Mrs. Gregg had signed this note also and they could have tried to collect from her, would, because of the practical effect of the thing, be a complete violation of congressional policy and intent of this statute, and we think under the laws we've cited to the Court that this defendant is entitled to refund of that sum.

And again, the 1,150 should be theirs, because we don't dispute the validity of the security agreement.

THE COURT: Thank you.

Mr. Kent?

MR. KENT: The statute that Mr. Gillman has not referred the Court to is contained in 11 U.S.C.S. Section